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CASE NO. 91-1289

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF OHIO,

Petitioner,

-vs-

DAVID S. MILLER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Does a person's innocent association with an alleged drug trafficker give the police the constitutional authority to stop and then subject that person to a search by forcing him to lie prone on the ground and roll over?

PARTIES

The parties to this case are the STATE OF OHIO, represented by Mr. Phillip Bogdanoff, 53 University Avenue, Akron, Ohio 44308; and DAVID S. MILLER, represented by Mr. J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325-2901.

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TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

David S. Miller, Respondent here, prays that this Court will deny the petition for a writ of certiorari as the position set forth by the State of Ohio lacks constitutional support.

STATEMENT OF THE CASE

The appellate court found that Mr. Miller's innocent association with a drug-trafficking suspect did not establish probable cause to arrest [**State v. Miller**, C.A. No. 14973, Ninth Judicial District at 4, unreported (July 31, 1991) (Appendix, hereafter App., at A-4)]. Nor did it believe Mr. Miller was engaged in criminal activity (**Id.**). The Court of Appeals also found the pat-down search to be unwarranted since the police, including members of the SWAT Team, greatly outnumbered Mr. Miller and they did not suspect Mr. Miller to be either armed or dangerous (Transcript, hereafter Tr., at 12). The Court of Appeals found that forcing Mr. Miller "to lie prone on the ground and then to roll over did not constitute a permissible stop and frisk." (**State v. Miller** at 7; App. at A-7). No exigent circumstances were presented which would have justified the actions of the police and the SWAT Team (**Ibid.**).

SUMMARY OF THE ARGUMENT

This case presents no viable constitutional issue to be reviewed by this Court. A person's innocent association with an individual suspected of drug trafficking has never been sufficient to support a stop of that person. In order to justify even the least intrusive stop of a citizen, the police must have personal knowledge of suspected criminal activity or have information from a reliable source, which reasonably indicates criminal activity or that the person stopped is armed or dangerous. Absent these circumstances, the police violate a person's Fourth Amendment right to be free from unreasonable searches and seizures when they order that person to lie prone on the ground and roll over.

REASON FOR DENYING THE WRIT

IN THE ABSENCE OF AN ARTICULABLE SUSPICION OF INDIVIDUAL CRIMINAL ACTIVITY, THE POLICE MAY NOT, CONSISTENT WITH THE FOURTH AMENDMENT, STOP AND SEIZE A CITIZEN MERELY BECAUSE THAT CITIZEN IS IN THE COMPANY OF A PERSON WANTED BY THE POLICE.

The United States Constitution is fragile. This Court has carefully interpreted the Constitution to insure that the principles embodied within the Constitution do not lose their significance. Before this Court, the State of Ohio seeks to upset the delicate balance between individual rights and society's need to combat criminal activity.

Under the guise of the war on drugs, the State proposes that police officers are entitled to stop persons who are in the company of drug trafficking suspects, without any suspicion that the individual stopped is about to, or has committed, a crime. Indeed, the State proposes that even though no suspicious behavior has been observed by the police officers, a person may be stopped, searched, and seized, based on mere association with a drug trafficking suspect. Furthermore, the State insists that if a citizen engages in a conversation with a criminal suspect on a public street, the police are entitled to stop and frisk the citizen. In essence, the State proposes that the Fourth Amendment has become a casualty of the war on drugs.

This proposition is unacceptable. The Bible says "Where there is no vision, the people perish: but he that keepeth the law, happy is he." (Proverbs 29:18) The United States Constitution and the Bill of Rights cry out against the State's

propositions. The Fourth Amendment to the Constitution guarantees the right of a person "to be secure in his or her person . . . against unreasonable searches and seizures." Absent suspicion of criminal activity, the Fourth Amendment protects the right of individuals to engage freely in a conversation with any person on a public street without the State intruding to stop, search, and seize the individual or the individual's possessions.[1]

In this case, the police had no suspicion that Mr. Miller was engaged in criminal activity. Rather, the basis for the stop, seizure, and search was that Mr. Miller was seen talking to a suspected drug trafficker. On this basis, the police stopped Mr. Miller, ordered him to lie prone on the ground, searched him, and ordered him to roll over. Under these circumstances, the

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1 In the 200 years that this Court has been interpreting the Fourth Amendment, this proposition, almost without exception, has been true. What appears to be the one exception to this proposition most recently appeared in **Michigan** v. **Sitz**, ___ U.S. ___, 110 S. Ct. 2481 (1990).

The **Sitz** Court recognized that a citizen was "seized" when stopped at a highway checkpoint. The issue in the case was whether the seizure was reasonable. In finding the brief seizure reasonable, the Court balanced the State's great interest in combating drunken driving versus the limited intrusiveness of a momentary highway checkpoint stop. **Sitz**, ___ U.S. ___, 110 S. Ct. at 2486. This Court felt that the balance weighed in favor of the State. The level of intrusion in **Sitz** was both subjectively and objectively low. The checkpoints were set up during the day, the drivers were aware of the stop well before their actual progress was impeded, and the police contact was minimal. **Sitz**, ___ U.S. ___, 110 S. Ct. at 2487. In the case at bar, Mr. Miller was standing on a public street when he was stopped. He was told to lie on the ground. Certainly the level of intrusion here was far greater than that in **Sitz**, thereby distinguishing this case from **Sitz**.

level of police intrusion went far beyond what a private individual standing on a public street would reasonably expect. One may expect to be queried by the police, but one does not expect to be held at gunpoint and forced to lie face down in the street in the absence of any suspicion of criminal activity.

Contrary to the State's argument, this Court has long held that mere association with a person suspected of criminal activity will not justify a seizure. In Sibron v. State of New York, 392 U.S. 1 (1968), a police officer observed the defendant engaged in conversation with known narcotics addicts for a period greater than eight hours. The officer neither heard any part of the conversation nor saw anything pass between the defendant or any of the others. The officer did not suggest on the witness stand that he was "in fear of bodily harm" or that he searched the defendant "in self-protection to find weapons." Sibron at 46. This Court stated:

> The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security . . . It is axiomatic that an incident search may not precede an arrest and serve as part of its justification (citations omitted). Thus the search cannot be justified as incident to a lawful arrest.

Sibron at 62-63.

Even though probable cause was lacking in Sibron, this Court was willing to find the search and seizure justifiable, if the officer had reasonable grounds to believe the defendant was

armed and dangerous. **Sibron** at 63. In the case at bar, the police were not confused as to which person they were supposed to search and detain (Tr. at 11). When the police arrived on the scene, they observed the suspect, Mr. Simmons, and Mr. Miller talking (Tr. at 6). Detective Miksch admitted that he had no evidence to support a reasonable suspicion that Mr. Miller was either engaged in criminal conduct, was armed, or dangerous (Tr. at 10). He did not hear any portion of the conversation between Mr. Miller and the alleged narcotics suspect. As the state Court of Appeals noted "it is significant that the police substantially out numbered the two men and no bystanders were initially present." (State v. Miller at 6; App. at A-6) Thus, the State's contention that mere association is enough to subject one to a stop is a radical departure from this Court's long-standing interpretation of the Fourth Amendment.

Likewise, this Court has historically held a firm rein on what constitutes a seizure. Starting with **Sibron**, this Court has emphasized that a police officer is not empowered to seize and search every person the officer sees on the street or of whom inquiry is made.

> Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.

Sibron at 64.

The original sire of this doctrine is found in the companion case to **Sibron**. The stop and frisk procedures outlined in **Terry v. Ohio**, 392 U.S. 1 (1968), limit the police to stopping citizens when the police directly observe unusual conduct which would lead the officer to reasonably conclude, based upon his experience, that the person is engaged in criminal conduct or armed and dangerous. In order for the stop and frisk to be valid under **Terry**, the officer must (1) identify himself as a law enforcement officer, (2) make reasonable inquiries, and (3) nothing in the initial stages of the encounter must serve to dispel his reasonable fear for his own or others' safety. The search must be confined to the outer clothing in an attempt to discover weapons which might be used to cause bodily injury or harm to the officer. In **Terry**, this Court emphatically stated:

> Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.

Terry v. Ohio, 392 U.S. at 19, n.16.

In this case, the basic requirements of a **Terry** stop were not met since Officer Miksch testified that he did not receive any information from the undercover team about the defendant, Mr. Miller (Tr. at 10). Furthermore, he did not directly observe Mr. Miller do anything which would arouse his suspicion that Mr. Miller was engaged in criminal conduct, was armed, or dangerous (Tr. at 10). The stop of Mr. Miller was based upon nothing more

than Mr. Miller's association with an alleged suspect of drug trafficking. This Court has directly held that stops may not be made on mere association with a drug trafficking suspect alone, but in this instance that is precisely what happened.[2]

Are the police to be allowed to make up their own rules and then attempt to justify them on theories already declared unconstitutional by this Court?

The stop of Mr. Miller may not be justified after the fact. A **Terry** stop must "last no longer than is necessary to effectuate the purpose of the stop" and "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." **United States v. Brignoni-Ponce**, 422 U.S. 873, 881-882 (1975); **see also Adams v. Williams**, 407 U.S. 143, 146 (1972). This Court has consistently stood by this standard.

In **Florida v. Royer**, 460 U.S. 491 (1983), airport detectives stopped and queried a suspected drug courier. The detectives then identified themselves as narcotics investigators and informed the suspect they had reason to believe that he was transporting narcotics. Without returning his airline ticket or driver's license, the detectives escorted the suspect, against

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2 For example, in **Ybarra v. Illinois**, 444 U.S. 85 (1979), the state argued that it could search individuals on the premises, which premises was the subject of a search warrant. This Court rejected this argument. The requirement of probable cause to support a seizure "cannot be irrelevant or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." **Ybarra** at 91.

his will, to a small room adjacent to the concourse, where he was held for approximately 15 minutes while the detectives searched his luggage. Although the suspect consented to the initial stop and search, this Court found that the involuntary detention exceeded the limited restraint permitted by **Terry** and thus escalated into an illegal arrest.

A valid **Terry** stop may be converted into an illegal arrest. In **Michigan v. Chesternut**, 486 U.S. 567 (1988), the Court defined when a person is "seized." The decisive test is whether, given the totality of circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." **Chesternut** at 569. This rule was most recently reiterated in **California v. Hodari D.**, 499 U.S. ___, ___, 111 S. Ct. 1547, 1551 (1991), when this Court held that a "seizure" does not occur simply because an officer approaches an individual and asks a few questions, so long as a reasonable person would feel free to disregard the police and go about his business. "The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." Florida v. Bostick, 499 U.S. ___, 111 S. Ct. 2383, 2386 (1991).

Assuming, arguendo, that the stop of Mr. Miller was a valid **Terry** stop, it became an illegal arrest when the police officers and a SWAT Team pounced upon Mr. Miller, constituting a "show of authority". **See, e.g., Brower v. Inyo County**, 489 U.S. 593, 596 (1989). Under these circumstances, Mr. Miller could not reasonably believe that he was free to leave. He did not consent

to the stop and the subsequent search. He had no choice. The police did not advise him that he had a right to refuse the search or to leave the area.

> "Consent" that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse.

Florida v. Bostick, ___ U.S. at ___, 111 S. Ct. at 2388.

Considering the totality of circumstances, Mr. Miller did not consent. He was ordered to the ground and ordered to lie face down. The police surrounded him and barked commands to comply with their orders. Faced with such intimidation, he complied immediately. It is not surprising that Mr. Miller complied under these circumstances. It is extraordinary, though, that the State now proposes to not only condone this kind of unreasonable behavior, but has the audacity to ask the Court to become a party to it. This is not the type of police action which is to be lauded and applauded; rather, it is to be condemned!

The consequences of allowing the State to detain and restrain private citizens without any suspicion of criminal activity are reminiscent of the days of witch-hunts. If the police were given unbridled authority to stop any person on a public street, just because they were engaged in conversation with another, the courts would become even more crowded then they now are. The public's sense of protection from unwarranted

governmental intrusion would be destroyed. This case is a prime example of that prophecy. Mr. Miller, a man who exhibited no furtive or criminal behavior, was reduced to lying prone on the ground and subjected to a warrantless and unjustified search. There is a line which the police absolutely may not cross. The line has been drawn by this Court. In **United States v. Cortez**, 449 U.S. 411, 417-419 (1981), this Court declared that a stop must be based upon a "particularized and objective basis for suspecting the particular person stopped of criminal activity." A stop must be based upon more than an "inchoate and unparticularized suspicion or 'hunch.'" **United States v. Montoya de Hernandez**, 473 U.S. 531, 542 (1985).

Inherent in this proposition is the idea that a citizen's Fourth Amendment right to be free from unreasonable searches and seizures is an individual right. Each person, when confronted by the police, may choose to exercise that right absent an officer's particularized and objective suspicion of criminal activity. Mr. Miller should have been able to make that choice and exercise that right. His opportunity to execute his rights was denied.

This Court has consistently rejected the argument that:

> a reviewing court should employ less stringent standards for reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest than the court would employ reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant.

Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 566 (1972).

Historically, reviewing courts have required an officer to have either a warrant or specific facts which would justify stopping a person. To that end this Court has maintained that:

> the standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment.

Ibid.

In **Brown v. Texas**, 443 U.S. 47 (1979), two officers observed one man walking away from another in an alley located in a high drug trafficking area. One of the men was stopped. One officer testified that the man was stopped because "the situation 'looked suspicious'" and the man was unknown to either officer. **Brown** at 49. This Court emphasized that under the Fourth Amendment:

> a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Brown v. Texas, 443 U.S. at 51.

None of the facts in this case justify any reasonable suspicion that criminal activity was afoot. The only observations made by the officers were that two men were talking to each other on a public street. Absent other evidence, it cannot reasonably be inferred that a conversation between two men on a

public street constitutes criminal activity. Detective Miksch admitted that Mr. Miller was unknown to him (Tr. at 7). Detective Miksch admitted that he had not received any information from other officers about Mr. Miller. (Tr. at 7) Indeed, his personal observations indicated only that the two men were talking (Tr. at 6). At the onset of these circumstances there were no bystanders (Tr. at 11). The officers observed no suspicious activity (Tr. at 3). The information radioed to the officers and the SWAT Team did not indicate that Mr. Miller was to be detained, was armed, or dangerous. In fact, the radio message contained no mention of Mr. Miller (Tr. at 6). Detective Miksch indicated that he "wasn't aware of any charges for Mr. Miller at that time," nor did he observe any suspicious behavior (Tr. at 7). Detective Miksch did not observe weapons on Mr. Miller (Tr. at 10).

Although the State does not cite to the case,[3] in Brown, under analogous circumstances this Court unanimously held:

> In the absence of any basis for suspecting . . . misconduct, the balance between the public interest and [a person's] right to personal security and privacy tilts in favor of freedom from police interference . . . When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

Brown v. Texas, supra, 443 U.S. at 52.

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3 More significantly, the State relied on **United States v. Thorpe**, 536 F.2d 1098 (5th Cir. 1976), in its Petition for Writ of Certiorari to this Court. **Thorpe** was expressly overruled in **United States v. Causey**, 834 F.2d 1179, 1184 (5th Cir. 1987).

A. An unreasonable protective search is presumptively invalid.

A protective search for weapons is permitted under **Terry v. Ohio**. Required elements to validate a protective search are (1) evaluation of the scope of the search, the reasonableness of the forcible stop and (2) whether the persons with whom the officers are dealing may be presently armed and dangerous. **Terry** at 30. In evaluating the latter requirement, the search must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." **Terry** at 29.

Neither element is present in this case. The scope of the search far exceeded any expectation of reasonableness. Detective Miksch testified that Mr. Miller was requested to lie on the ground in order "control him (Tr. at 11-12) Where was Mr. Miller going to go when he was surrounded by so many police officers, even Detective Miksch did not remember the exact number (Tr. at 11). Under these circumstances any reasonable person would not attempt to run. Detective Miksch agreed that Mr. Miller did not run (Tr. at 13). Mr. Miller's compliance was immediate (Tr. at 7). Although retrospective, one could argue that under these circumstances a stand up pat-down for weapons would have been reasonable. The officers went far beyond that.

The resulting searcn produced no guns, knives, clubs, or other hidden instruments. In fact, no weapons of any kind were found. When Mr. Miller rolled over in compliance with the officer's orders, a two-inch pipe fell out of his pocket, resulting in Mr. Miller's formal arrest (Tr. at 8).

Whether a law enforcement practice is permissible is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." **United States v. Montoya de Hernandez**, 473 U.S. 531, 537 (1985). See also **United States v. Villamonte-Marquez**, 462 U.S. 579, 588 (1983); **Delaware v. Prouse**, 440 U.S. 648, 654 (1979); **Carmara v. Municipal Court**, 387 U.S. 523, 534-35 (1967).

This stop was impermissible. The government interests in this setting were not legitimate and did not outweigh the right of Mr. Miller to be secure from unreasonable searches and seizures. The State of Ohio declares the authority of the police to stop and search companions of a person suspected of drug trafficking. This interest has not been legitimized by this Court. In **Florida v. Bostick**, ___ U.S. ___, 111 S. Ct. 2382, 2389 (1991), this Court held:

> This Court . . . is not empowered to suspend constitutional guarantees so that the Government may more effectively wage a "war on drugs." (citations omitted) If that war is to be fought, those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime.

The right to be free from unreasonable searches and seizures is an individual right. A warrantless stop and search made without reasonable or individualized suspicion of criminal activity, but resting solely on mere association or conversation with a drug-trafficking suspect, is constitutionally unsupportable.

This Court has consistently rejected arguments which would further erode the Fourth Amendment and give police a right to subject citizens to a stop and search based on mere association without any suspicion of criminal conduct. The right to be free from unreasonable searches and seizures is an individual right.

CONCLUSION

Respondent David S. Miller prays that this Court will deny the Petition for Writ of Certiorari.

Respectfully submitted,

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STATE OF OHIO)		IN THE COURT OF APPEALS
)	ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT)		

STATE OF OHIO	)	C.A. NO. 14973
	)	
Plaintiff-Appellee	)	
	)	
v.	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE
DAVID S. MILLER	)	COMMON PLEAS COURT
	)	COUNTY OF SUMMIT, OHIO
Defendant-Appellant	)	CASE NO. CR 90 10 1901

DECISION AND JOURNAL ENTRY

Dated: July 31, 1991

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Per Curiam. Defendant-appellant, David Samuel Miller, appeals a ruling of the Summit County Court of Common Pleas finding that a search of his person prior to his arrest satisfied the requirements of the Fourth Amendment to the United States Constitution.

Facts

The events leading to Miller's indictment for possessing criminal tools, R.C. 2923.24, and drug abuse, R.C. 2925.11, are not disputed. During the evening of October 6, 1990, the Akron Police Department conducted a drug sweep in response to complaints from residents in the vicinity of Wildwood Avenue. An undisclosed number of narcotics

officers and SWAT team members participated in the endeavor. Detective Thomas Michael Miksch, who had sixteen years experience in narcotics investigations, received a radio dispatch instructing him to arrest Leo Simmons for aggravated trafficking in cocaine. In order to preserve the secrecy of the operation, the detective did not approach Simmons until he had left the area where undercover officers were attempting to make drug-buys. Detective Miksch later observed Simmons at a street corner known for narcotics sales. Simmons was engaged in a conversation with Miller. No one else was present in the vicinity.

Accompanied by several officers, Detective Miksch confronted Simmons and Miller and ordered them to lie on the ground. He conducted a pat-down search of Miller and instructed him to roll over. A two-inch glass cylinder fell out of Miller's pocket as he complied. Recognizing the object as a tool for smoking cocaine, the detective seized it and placed Miller under arrest. The pipe was later found to contain cocaine residue.

Miller filed a pre-trial motion in the common pleas court seeking suppression of the pipe as the fruit of an illegal search. At an evidentiary hearing on the matter, Miksch testified that he had observed no suspicious actions by Miller, and in response to a question concerning whether there was any indication that Miller might have had weapons on him, Miksch stated that he had no way of knowing until he patted him down.

Without making any factual findings as to there being either a reasonably articulable suspicion as to Miller's commission of a crime, or reasonable belief that he was armed, the trial court overruled the motion. Miller pleaded no contest to the charge of drug abuse and this appeal follows.

Assignment of Error

> "The defendant-appellant, David Samuel Miller, for his assignment of error, says that the decision rendered by the Court of Common Pleas, Summit County, Ohio, on January 2, 1991, is erroneous in overruling defendant's motion to suppress illegally obtained evidence."

There can be little doubt that when the officers approached Simmons and Miller and ordered them to lie on the ground, a "seizure" was effected for Fourth Amendment purposes. United States v. Mendenhall (1980), 446 U.S. 544, 552-555. Once Miller moved to suppress the evidence obtained, the prosecution bore the burden of establishing the constitutional propriety of the warrantless search. Xenia v. Wallace (1988), 37 Ohio St. 3d 216, paragraph two of the syllabus.

The trial court determined that probable cause existed to believe Miller was engaged in criminal activity as he stood on the street corner talking with Simmons. Under such circumstances an immediate, warrantless search of his person would be constitutionally justified as contemporaneous with a lawful arrest. United States v. Robinson (1973), 414 U.S. 218, 235; State v. Moon (May 15, 1991), Lorain App. No.

90CA004882, unreported, at 4-5. Given that the facts presented are not in question, we review this legal conclusion de novo. See United States v. Maybusher (C.A. 9, 1984), 735 F. 2d 366, 371 fn. 1, certiorari denied (1985), 469 U.S. 110.

Probable cause to arrest and search an individual exists when the facts available to the officers at that moment warrant a person of reasonable caution in the belief that an offense has been committed. Beck v. Ohio (1964), 379 U.S. 89, 96. When the police initially encountered Miller, he was simply talking with Simmons in a high-crime neighborhood. Detective Miksch testified at the hearing that he did not know the subject matter of the conversation and no weapons, drugs, or suspicious actions were observed.

Miller's mere association with Simmons, albeit he was a drug-trafficking suspect, did not establish probable cause to arrest. As the United States Supreme Court stated in Sibron v. New York (1968), 392 U.S. 40, 62:

> "***The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.***."

The Court further explained in Ybarra v. Illinois (1979), 444 U.S. 85, 91, that:

> "***Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another[.]"

See, also, State v. Fahy (1988), 49 Ohio App. 3d 160, 161-162.

In cases involving arrests in high-crime areas, courts employing the probable cause analysis generally require more concrete examples of furtive behavior than mere association with a criminal suspect. See, e.g., United States v. Davis (C.A.D.C. 1972), 458 F. 2d 819, 822; United States v. Brown (C.A.D.C. 1972), 463 F. 2d 949, 950-951; United States v. Thomas (C.A.D.C. 1976), 551 F. 2d 347, 348; United States v. White (C.A.D.C. 1981), 655 F. 2d 1302, 1304. We find that these two factors, standing alone, did not furnish probable cause to believe that Miller was engaged in criminal activity.

It has been suggested, however, that even if probable cause did not exist, the officers' conduct was justified under the intermediate "stop and frisk" standard. In Terry v. Ohio (1968), 392 U.S. 1, 27, the United States Supreme Court recognized that:

> "***there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.***And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." [Citations and footnote omitted.]

The search approved in that opinion "consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault." Sibron, supra, at 65.

The Supreme Court has made it quite clear that the justification for this type of intrusion must also be personalized.

"***.

> "Notwithstanding the absence of probable cause to search Ybarra, the State argues that the action of the police in searching him and seizing what was found in his pocket was nonetheless constitutionally permissible. We are asked to find that the first patdown search of Ybarra constituted a reasonable frisk for weapons under the doctrine of Terry v. Ohio ***.
>
> "We are unable to take even the first step required by this argument. The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons.***."

Ybarra, supra, at 92-93 [footnote omitted].

As previously stated, there was no evidence allowing a reasonable suspicion that Miller was either engaged in criminal conduct or armed and dangerous. It is significant that the police substantially outnumbered the two men and no bystanders were initially present. Consequently, a pat-down search was unwarranted.

Also significant is the concept that the scope of a Terry search "must be limited to that which is necessary for the discovery of weapons which might be used to harm the

officer or others nearby". Terry, supra, at 26; see, also, State v. Bobo (1988), 37 Ohio St. 3d 177, 180; State v. Andrews (1991), 57 Ohio St. 3d 86, 89. The Court has noted that:

> "***.
>
> "We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.***."

Terry, supra, at 24-25.

Under these facts, forcing Miller to lie prone on the ground and then to roll over did not constitute a permissible stop and frisk. Detective Miksch explained at the hearing that this practice was necessary to "control" Miller. However, Miller had shown no propensity to flee or resist the pat-down and was, in any event, outmanned by the numerous armed officers present. Quite simply, no exigent circumstances were presented which would have justified anything more than the quick frisk for weapons sanctioned by Terry and its progeny.

In Bobo, supra, Andrews, supra, and State v. Williams (1990), 51 Ohio St. 3d 58, the Supreme Court of Ohio examined the intermediate stop and frisk standard. All three scenarios involved far more obvious signs of wrongdoings than that presented in the instant appeal. Bobo,

supra, at 179 (suspect attempting to hide object under seat of car while parked at night in known drug-trafficking area); Williams, supra, at 61-62 (suspect, clothed in hunting attire, found at deserted house near marijuana field without credible reason for being there); Andrews, supra, at 88 (suspect seen running from police cruiser and tossing away object in high-crime neighborhood at night). In each case, the court found a brief frisk of the suspect to be constitutionally permissible under Terry. However, none of these opinions suggest that anything more -- including a demand that the suspect lie prone on the ground -- would be acceptable under the circumstances.

In light of the routine and unremarkable nature of the officers' confrontation with Miller, their actions were excessive. See Dunaway v. New York (1979), 442 U.S. 200, 207-216. It is undisputed that the small pipe was discovered only as a result of Miller rolling on the ground in compliance with the detective's order. Therefore, this evidence should have been suppressed as the product of an illegal search and seizure. Terry, supra, at 28-29.

Conclusion

Miller's sole assignment of error is therefore sustained. Pursuant to App. R. 12(B), the motion to suppress is granted and Miller's plea of no-contest is vacated. This case is remanded for further proceedings.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

William R Baird

WILLIAM R. BAIRD
PRESIDING JUDGE FOR THE COURT

BAIRD, P. J.
CACIOPPO, J.
CONCUR

REECE, J.
DISSENTS SAYING:

I agree that the trial court erred in basing its decision on probable cause to arrest grounds. This case centers on the right of the police officers to conduct a pat-down of Miller for weapons while making an arrest, with clear probable cause, of Simmons. I disagree with the majority's conclusion.

I fear this decision follows too many others by courts that engage in legal, intellectual exercises under the guise of lofty constitutional pronouncements but ignore the realities and facts of the situation.

Once again, I emphasize that the Fourth Amendment of the United States Constitution, as well as Article I, Section 14 of the Ohio Constitution, prohibit unreasonable searches or seizures. The reasonableness of the actions of the police in this case, in checking for weapons, is borne out both by the facts and myriad case law.

In the real world today, our cities are collapsing around us, the criminal element, emboldened by the greed and need in drugs, has virtually taken over some of our streets and neighborhoods, including the one herein. Random drive-by shootings and senseless killings, both of civilians and policemen, over drug deals are commonplace.

We sit in our secure courtrooms and split hairs while split-second, life or death decisions are being made on the battlegrounds of our streets by the police.

I do not believe that it is an abdication of our constitutional rights or responsibilities, in this day and age of almost every type of assault and automatic weapons, of unpredictable drug users and traffickers, to permit the police to protect themselves and the public at large by a pat-down search for weapons of both Simmons and Miller.

An arrest, especially a drug arrest, in the nighttime, in a drug-plagued location, of an observed drug trafficker,

does not occur in a polite, emotion-free, peaceful, antiseptic manner. It is an unpleasant and dangerous business at best.

The testimony is clear that the police intended to let Miller go on his way if no weapons were found on him. They did not intend to arrest him until such time as his drug pipe became obvious to them. To ignore the evidence of a crime at that point would not be fulfilling their duty.

If the problem is the fact that Miller was ordered to lie on the ground and then to roll over in order to effect his pat-down, numerous courts have seen no difference between this procedure and similar ones, and the classic spread eagle and arms raised positions. Terry v. Ohio (1968), 392 U.S. 1; United States v. Berryhill (C.A. 9, 1971), 445 F. 2d 1189, 1193; United States v. Poms (C.A. 4, 1973), 484 F. 2d 919, 922; United States v. Simmons (C.A. 7, 1977), 567 F. 2d 314, United States v. Jacobs (C.A. 9, 1983), 715 F. 2d 1343, 1345-1346; United States v. Taylor (C.A. 9, 1983), 716 F. 2d 701, 709; United States v. Buffington (C.A. 9, 1987), 815 F. 2d 1292, 1300-1301; United States v. Laing (C.A.D.C. 1989), 889 F. 2d 281, 285-286, certiorari denied (1990), 108 L. Ed. 2d 792; State v. Farmer (1984), 21 Ohio App. 3d 77, 486 N.E. 2d 238; State v. Moncrief (1980), 69 Ohio App. 2d 51, 431 N.E. 2d 336. Due deference must be afforded to the decisions of "those versed in the field of law enforcement." United States v. Cortez (1981), 449 U.S. 411, 418; "A 'reasonable reaction' in this

context***turns on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" United States v. White (C.A.D.C. 1981), 648 F. 2d 29, 40, quoting Brinegar v. United States (1949), 338 U.S. 160, 175 [emphasis added].

If it is truly "unreasonable" for an experienced police officer making a legitimate arrest of a drug trafficker, at night, in a high crime area, to control and frisk an individual associating with the suspect before sending him on his way, then we should hope that Blue Coats, Inc. is well funded.

I would affirm the judgment below.

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